No. 80-5392

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

ROBERT HOWE, *Petitioner,*

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL OF THE UNITED STATES
NORMAN CARLSON, DIRECTOR OF THE UNITED STATES BUREAU OF PRISONS, AND
WILLIAM CIUROS, JR., COMMISSIONER OF CORRECTIONS, STATE OF VERMONT,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the authority of the Federal Bureau of Prisons to receive state prisoners into federal penal or correctional institutions is limited by statute to cases where appropriate treatment facilities and personnel are available in the federal prison system for inmates with specialized treatment needs.

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Sourcebook of Criminal Justice Statistics — 1976, U.S. Department of Justice (1977) p. 722 36

Sourcebook of Criminal Justice Statistics — 1977 U.S. Department of Justice (1978) p. 666 36

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OPINIONS BELOW

The opinion of the United States District Court for the District of Vermont (J.A. 31-37) is reported at 480 F.Supp. 111 (1979). The opinion of the United States Court of Appeals for the Second Circuit (J.A. 38-45) is reported at 625 F.2d 454 (1980).

JURISDICTION

The judgment of the Court of Appeals (J.A. 46-47) was entered on June 23, 1980. A petition for a writ of certiorari was timely filed by mailing on September 11, 1980 and docketed in the Supreme Court on September 15, 1980. Certiorari was granted on January 26, 1981. This Court's jurisdiction rests upon 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

18 U.S.C. §4001(a), "Limitation on detention; control of prisons," provides

> No citizen shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress.

18 U.S.C. §5003, "Custody of State offenders," reads as follows:

> (a) The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.
>
> (b) Funds received under such contract may be deposited in the Treasury to the credit of the appropriation or appropriations from which the payments for such service were originally made.
>
> (c) Unless otherwise specifically provided in the contract, a person committed to the Attorney General hereunder shall be subject to all the provisions of law and regulations applicable to persons committed for violations of laws of the United States not inconsistent with the sentence imposed.
>
> (d) The term "State" as used in this section includes any State, territory, or possession of the United States, and the Canal Zone.

STATEMENT OF THE CASE

The petitioner was convicted of murder in a Vermont court and sentenced to life imprisonment on December 13, 1976. J.A. 32. He had been in state custody at the St. Albans Diagnostic and Treatment Facility for several months prior to his sentencing.

A hearing was held by the State Department of Corrections in February 22, 1977 to determine whether he should be transferred from St. Albans to the federal prison system. J.A. 21. The hearing officer recommended the transfer and the Vermont Commissioner of Corrections approved it on March 9, 1977. J.A. 19-20. Petitioner was sent first to the United States Penitentiary at Atlanta, Georgia. After a stay of approximately nine months in Atlanta he was transferred to the United States Penitentiary at Terre Haute, Indiana, where he is currently incarcerated. Transcript of August 21, 1979 (hereinafter "Trial Transcript") pp. 38-40; J.A. 33.

In a complaint filed December 5, 1978 in the United States District Court for the District of Vermont the petitioner challenged his transfer to the federal authorities on the ground that the federal Bureau of Prisons lacked statutory authority to accept custody. He alleged that the Attorney General and the Director of the Bureau of Prisons had not made any determination that an appropriate and adequate treatment program existed for him in the Federal Prison System. J.A. 4 para. 7. He further alleged that none had been provided; he was merely incarcerated. J.A. 4 para. 8. It was petitioner's position that the sole statutory authority for transfers of state inmates, 18

U.S.C. §5003, required individual determinations by the federal authorities that "proper and adequate treatment facilities are available"; no individual determination had been made and in any case the transfer had not been effected for special treatment needs but for general penalogical reasons: maximum security incarceration and the normal types of prisoner programming. Trial Transcript 2, 6.

It was conceded by the State Department of Corrections (which was permitted to intervene in the case) that the State Commissioner of Corrections, for his part, does not "designate an inmate be transferred to go to a specific program at a given institution," although he has a general awareness of federal prison programs. Trial Transcript 9; J.A. 32-33. After determining to make a transfer the Commissioner delivers the prisoner to the Bureau of Prisons at the Metropolitan Correctional Center in New York City, "and they take over from there." Once in the federal system the state inmate is programmed in the same way as federal prisoners. Trial Transcript 9-10. Following the state's decision to transfer in this case (and generally) the State Corrections Department received no notice or certification issued by the Bureau of Prisons to the effect that a treatment program was available. Trial Transcript 27.

The Bureau normally accepts all prisoners referred to it, but reserves the right to refuse an inmate; it refused in one case to accept a transvestite who had undergone part but not all of a sex change operation. Deposition of James W. Tippy, August 13, 1979 (hereinafter "Tippy

Deposition") p. 8.[1] In another case, an inmate was returned to the state for protective custody reasons, the state agreeing to the re-transfer. Trial Transcript 29-30. With such exceptions state inmates are placed in the federal system according to the same criteria used for federal prisoners. Tippy Deposition 9, 23, 25.

The federal penitentiaries at Atlanta and Terre Haute offer "psychiatric counselling, alcoholics anonymous meetings, drug abuse sessions, educational courses and vocational and work training." Also "religious programs . . . a library, television, movies and various athletic programs." J.A. 33. The programs in the state prison were substantially similar but were somewhat less accessible to petitioner because of his maximum security status; while in state custody he received "psychiatric counselling and educational courses but others probably were available to him if he wished." J.A. 33. Petitioner testified that a psychiatrist at Terre Haute told him he did not need psychiatric help and the counselling was stopped. Trial Transcript 40. He had been employed running a sewing machine until a recent heart attack. "His principal activities now are knitting and crocheting." Trial Transcript 49; J.A. 33.

The Second Circuit, in response to Howe's claim that his transfer could only be justified by specialized treatment needs took the view that "such a showing in Howe's case might be difficult. Given the nature of his

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[1] The Tippy deposition was filed after the trial, J.A. 1, and received in evidence, Trial Transcript 51-52.

crime and the length of his sentence, it is likely that deterrence rather than hopes of reform provided the basis of his imprisonment." J.A. 42 n. 4.

The government took the position that neither the state nor the federal government is required to make an individualized determination that particular treatment programs are available in the federal system. Trial Transcript 3,4. As authority for the transfer and "certification" by the Bureau of Prisons it points to an agreement between the state and federal governments dated February 25, 1975, which recites in a preamble that "The Director of the Bureau of Prisons has certified that facilities are available" at "federal institutions." J.A. 10. Under the contract the state could send up to 40 state inmates to the Bureau, without the Bureau's prior approval; if the state wanted to send more than forty, individual applications were required. J.A. 11. The state was to deliver them to the Federal Correctional Facility in New York City (now the Metropolitan Correctional Center) to be received in federal custody. Petitioner's transfer was effected pursuant to this contract. J.A. 11,40.

SUMMARY OF THE ARGUMENT

18 U.S.C. §5003(a) grants the Attorney General limited authority to confine state or territorial inmates when "proper and adequate treatment facilities and personnel are available." The phrase refers to specialized programs mandated by Congress for particular classes of inmates, and also to other programs or institutions which can be

called "treatment facilities" in common speech. These include programs for youth, young adults, narcotics addicts, alcoholics, the mentally ill, and inmates with physical ailments or disabilities. Thus, the Youth Corrections Act mandates a special sentencing program for the "treatment" of youth. 18 U.S.C. §5010(b). The phrase "proper and adequate treatment facilities and personnel" appears also in §5012 of the YCA. Eligible prisoners under the Narcotics Addict Rehabilitation Act are also sentenced to "treatment." 18 U.S.C. §4253(a). Alcoholism has been Congressionally defined as an illness, and facilities established for alcoholics under the Comprehensive Alcohol Abuse and Alcohol Prevention Treatment and Rehabilitation Program, 42 U.S.C. Ch. 60, are also treatment facilities. The mentally and physically ill or handicapped are also in need of "treatment facilities" as that term is used in common English. Congress and the Bureau have established special treatment facilities for them. Legislative history supports the proposition that Congress, in enacting §5003, intended to authorize federal custody only in cases of special treatment needs.

The court below held that the term "treatment facilities" referred broadly to federal prisons, inasmuch as federal prisons have a reforming or "treatment" goal. J.A. 44-45. The reference to treatment was, moreover, entirely nominal. The transferred prisoner need not receive any rehabilitative "treatment" in the receiving institution. J.A. 44-45. The Seventh Circuit in *Anthony, et al.* v. *Wilkinson, et al.*____F.2d____(December 23, 1980)

held that the prison's rehabilitative goal must be more than nominal; that a "sufficient array of rehabilitative programs" was required to justify a transfer under §5003.

Neither of these constructions is supportable. Both do violence to the plain meaning of the statute. Nowhere in the statutes are prisons referred to generically as "treatment facilities." Legislative history points to the contrary conclusion. The general rule that agency interpretations of a statute are to be given weight is inapplicable to this case. The Bureau of Prisons' expansive reading of §5003 is of uncertain origin and was never promulgated in any rule or published order. The Bureau's formal regulations, by contrast, retain the statute's "treatment facilities" language.

State inmates have an expectation, under §5003, that they will not be transferred to the federal prison system except in cases of special treatment needs where the Bureau can offer appropriate treatment facilities. They have a right to hearing, such as that afforded inmates in *Vitek* v. *Jones,* 445 U.S. 480 (1980), on these issues.

After transfer to federal facilities, state prisoners must be returned to their states once treatment has been terminated. The Bureau can not reclassify or retransfer them out of treatment facilities while retaining custody of them for the remainder of their prison sentences.

Vermont's claim that it can not confine the petitioner except in the federal system is unfounded. The state was able to hold him in the state for many months before the transfer. If state facilities are in fact inadequate, Vermont

can resort to transfers under the New England and Interstate Corrections Compacts, 28 V.S.A. §§1401-1410, 1601-1610, or it can upgrade existing facilities or construct new ones.

Inmates transferred thousands of miles from their homes suffer a kind of banishment inflicting deprivations above and beyond those of normal incarceration. It is recognized that transfers are generally detrimental to the rehabilitative process.

Construing the statute as the Bureau does opens the door to a national, not a federal prison system. If Congress had meant this major reshaping of our penal systems, it would not have accomplished it by oblique reference to treatment facilities.

ARGUMENT

18 U.S.C. §5003 GRANTS THE ATTORNEY GENERAL LIMITED AUTHORITY TO ACCEPT STATE AND TERRITORIAL INMATES WITH SPECIAL TREATMENT NEEDS INTO FEDERAL "TREATMENT FACILITIES" AS THAT TERM IS USED BY CONGRESS AND IN COMMON SPEECH.

At issue in this case is the construction of 18 U.S.C. §5003(a) which authorizes the Attorney General to accept state inmates into federal prisons on a contract basis. The section reads as follows:

> (a) The Attorney General, when the Director [of the Bureau of Prisons] shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the cus-

> tody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

In 1978 the Seventh Circuit, *en banc*, held in a prisoner's habeas corpus proceeding that the statute authorizes transfers of state or territorial inmates for special treatment needs; the section "was not intended . . . to put the federal government in the rent-a-prison business unless there was some special treatment need with which the state required assistance." *Lono* v. *Fenton*, 581 F.2d 645, 648 (7th Cir. 1978). Because confinement of citizens in federal prisons is prohibited "except pursuant to an act of Congress," 18 U.S.C. §4001(a), Lono was ordered returned to the custody of the state. Three judges joined in a vehement dissent, arguing that §5003 imposed no "substantive limitation or restriction" on the Attorney General's power to accept state prisoners. 581 F.2d at 649.

The reaction to *Lono* was swift and almost unanimously negative. In *Sisbarro* v. *Warden*, 592 F.2d 1, *cert. denied* 444 U.S. 849 (1979), the First Circuit held with the *Lono* dissent, finding no "substantive limitation" in the statute. The Second Circuit followed with its decision in this case, construing the phrase "treatment facilities" as a euphemism for "federal prison." J.A. 44-45. The Third Circuit agreed with this construction in *Beshaw* v. *Fen-*

ton, ____ F.2d ____ (No. 79-1777, December 15, 1980).[2] Faced with this rejection of *Lono*, the Seventh Circuit modified its position in *Anthony* v. *Wilkinson*, ____ F.2d ____ (Nos. 1361-2571, 2374, 2410-2412, 2485-2488, 2531-2533, 2567, Dec. 23, 1980) holding that a "sufficient array of rehabilitative programs" in a prison could constitute specialized treatment under the statute.

We argue below that *Lono* was correctly decided. The term "treatment facilities" in §5003 can not be construed to mean prison without breaking the most fundamental rules of statutory construction. Nor does it mean simply a sufficiently benign and rehabilitative prison, the *Anthony* court's construction. It means what Congress has said it means in related contexts, specialized programs or institutions for specific types of offenders: youth under twenty-two years old and young adults twenty-two to twenty-six, narcotics addicts, alcoholics, mental patients, and any inmate in need of medical care.

A. Treatment Facilities Are Institutions and Programs for Special Treatment Needs; The Term is Not a Euphemism for Prison.

The statute authorizes the enrollment of state prisoners in federal "treatment facilities," once the Bureau certifies that such facilities are available. The clause

[2] District Court opinions also generally rejected *Lono*. A District Court in the Tenth Circuit followed the *Lono* dissent, *Fletcher* v. *Warden*, 467 F.Supp. 777 (D. Kan. 1979). Before the *Beshaw* decision, District Courts in the Third Circuit were in disagreement, *Ali* v. *Gibson*, 483 F.Supp. 1102, 1124 (D. V.I. 1980) preferring the *Lono* majority and *Bowers* v. *Fenton*, 488 F.Supp. 570 (M.D. Pa. 1979) holding with the *Lono* dissent.

requiring certification would be meaningless if the prisoner could, upon certification, be transferred to something which was not a "treatment facility." When the certification is made, the Bureau may contract for "custody, care, subsistence, education, treatment, and training"; the Bureau undertakes to be in charge of everything, including treatment. This much, at least, is clear from the face of the statute.

The term "treatment facilities" can not be a euphemism for prison as the Second Circuit thought.[3] The language was taken *in haec verba* from the Youth Corrections Act, 64 Stat 1086-1089, 18 U.S.C. §§5005-5024, which was enacted in 1950, two years before §5003. Section 5012 of the YCA provides that no offender may be committed under the act until the Director of the Bureau of Prisons

> shall certify that proper and adequate treatment facilities and personnel have been provided.

The phrase "custody, care, subsistence, education, treatment, and training" also exactly tracks the YCA.[4] Com-

[3] The Second Circuit wrote:

> The fact that the statutory language refers to federal prison subject to the legislation as "treatment facilities" adds little to the debate. More plausible than the argument that this phrase was intended to limit the use of the statutory program to persons in need of treatment is the explanation that the phrase simply named those institutions in terms of the most laudable (if, perhaps, least often realized) goal the institutions serve, namely, the reform of prisoners through treatment.

J.A. 44-45.

[4] The First Circuit in *Sisbarro* wrote that this list of functions covered by the contract "runs the gamut of penological purposes."

mitments under the YCA may be made to a non-Bureau facility, in which case the Director may contract

> for the custody, care, subsistence, education, treatment, and training of committed youth offenders . . .

18 U.S.C. §5013

As used in the YCA "treatment facilities" means something different from ordinary prison. The YCA mandated a special and comprehensive sentencing program for the "treatment" of youth convicted of criminal offenses. See *Dorszynski* v. *United States,* 418 U.S. 424, 434 (1974); *Durst* v. *United States,* 434 U.S. 542, 544-547 (1978).

> An integral part of the treatment program was the segregation of the committed persons, insofar as practicable, so as to place them with those similarly committed, to avoid the influence of association

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Sisbarro v. *Warden, supra,* 592 F.2d at 4. Consequently, the court implied, "treatment-facilities" must mean prisons.

The list only runs the gamut of non-penal penological purposes; it omits discipline and punishment. With this qualification, we agree that "custody, care, subsistence, education, treatment, and training" can all be accomplished in a prison. This is not to say, however, that prisons and treatment facilities are synonymous.

The same listing of penological purposes appeared in the Juvenile Delinquency statutes before their amendment in 1974, Public Law 93-415, 88 Stat. 1135. 18 U.S.C. §5034 then provided for the "custody, care, subsistence, education, and training" of juvenile delinquents. The former 18 U.S.C. §5036 provided that these functions could be carried out in foster homes or other public or private agencies.

> with the more hardened inmates serving traditional criminal sentences.

Dorszynski v. *United States, supra,* 418 U.S. at 434.

In *Carter* v. *United States,* 306 F.2d 283 (D.C. Cir. 1962) in an opinion by Chief Justice (then Judge) Burger, the court upheld a four-year YCA commitment against a claim that it was longer than the maximum sentence which an adult could have received. The inmate was committed for a longer time "but under different conditions and terms than a defendant would undergo in ordinary prison." 306 F.2d at 285.

Congress has never referred to prison as "treatment facilities" or treatment anything. The term which appears throughout Title 18 of the Code is "Federal penal and correctional institutions." Thus, 18 U.S.C. §4001(b)(1) vests the Attorney General with control of "penal and correctional institutions"; "penal and correctional institutions" are what the Bureau manages and regulates. 18 U.S.C. §4042(1); 28 C.F.R. §0.95(a). The generic term in the Bureau's regulations is simply "institution," defined to mean "a U.S. Penitentiary, Federal Correctional Institution, Medical Center for Federal Prisoners, Federal Prison Camp, Federal Community Treatment Center, Federal Detention Center, or Metropolitan Correctional Center." 28 C.F.R. §500.1(d).

The "treatment facilities" language of §5003 is also unique among prisoner transfer statutes. The Bureau is empowered to transfer prisoners *to* the states. "[f]or the purpose of providing suitable quarters for [their] safekeeping, care and subsistence . . ." for a period of

three years. 18 U.S.C. §4002. The statute does not mention treatment. Persons convicted in a military court-martial may be confined "in any penal or correctional institution under the control of the United States . . ." 10 U.S.C. §858. By regulation the Bureau accepts these military prisoners "if, after examination of all available information, the Bureau of Prisons can provide appropriate resources for the inmate's needs." 28 C.F.R. §527.10(a). The qualification here is suggestive of §5003's phraseology, but far broader; military inmates are not accepted or rejected on the basis of their *treatment* needs or the availability of treatment facilities. Congress has recently enacted elaborate rules governing the transfer of inmates to and from foreign countries pursuant to treaty. 18 U.S.C. §§4100-4115. The Attorney General is empowered under this chapter to receive United States nationals serving sentences in foreign prisons in federal "penal or correctional institutions." §4102(2). The word treatment is used only in connection with two types of prisoners: juveniles (". . . issue regulations for the transfer and treatment of juveniles," §4102(8)), and the mentally ill (§4102(9)).

"Treatment" is as vague as any word in the language. Its primary meaning is therapy. It also has the neutral sense of specified behavior towards another, as in humane or inhumane treatment. The word is used in this neutral way in some of the statutes. Thus, 18 U.S.C. §4081 mandates a system of segregation and classification for the "individualized" treatment of prisoners. There is even a colloquial sense in which treatment means punishment ("the treatment"). "Facilities" is

also ambiguous. It can mean institutions (as in "correctional facilities") or programs and equipment within institutions (as in "educational facilities," "medical facilities," or "athletic facilities").

The two words in combination are somewhat less diffuse. The term "treatment facilities" can denote programs as well as institutions. But it does not, except in a far-fetched way, mean schools, vocational programs, or athletic facilities. Nevertheless, the precise content of the term is not obvious and resort to legislative history is in order.

Congress passed the YCA in 1950. Less than a year later the future §5003 was introduced in the Senate as S.2160 at the request of Deputy Attorney General Peyton Ford who explained the purpose of the bill in a letter accompanying the draft:

> Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but not available to the States. These requests usually relate to juveniles, concerning whom many of the States are without satisfactory institutions and training programs.

S. Rep. No. 978, 82 Cong., 1st Sess. 2 (1951).

The Committee Report appends the entire letter and the quoted passage is excerpted in the body of the Report.

On the Senate floor Senator McCarran was asked for an explanation of the bill. He replied that the current law

allowed the Attorney General "to make contracts with State officials for the purpose of temporary confinement of Federal prisoners [18 U.S.C. §4002]. This bill would authorize a more or less reciprocal arrangement whereby, *under certain conditions in a limited category of cases* . . . the Attorney General may contract with State officials for the custody of persons convicted and sentenced under State laws." 97 Cong. Rec. 13543 (1951). The bill passed the Senate without further debate.

S. 2160 was then referred to the House Judiciary Committee which recommended passage in a report which emphasized that its purpose was to make federal treatment programs available to the states. In its Statement of the bill, the report recites,

> Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but are not available in the States. These requests usually relate to juveniles and drug addicts, concerning whom many of the States are without satisfactory institutions and training programs.

H.R. Rep. No. 1663, quoted in 1952 U.S. Code Cong. and Administrative News, p. 1421.

The bill was meant "to accommodate those State offenders that are in need of the various types of treatment that Federal institutions are providing." The expenses "in connection with an inmate's subsistence, medications, etc." would be borne by the states. Id. In its discus-

sion of the contents of the bill the Committee wrote:

> The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment. The term "treatment" as used in this bill, in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act (sec. 5006g, title 18, U.S.C.).

Id.

The bill passed the House without debate or amendment on May 5, 1952, 98 Cong. Rec. 4801, and President Truman signed it into law on May 9, 1952. 98 Cong. Rec. 4967.

Its placement in the Code, as an addition to Part IV of Title 18, under the caption "Correction of Youthful Offenders," was provided for by the Act itself. Public Law 333, May 9, 1952, c. 253, §2, 66 Stat. 68.

After the *Lono* decision the government submitted a proposed amendment to §5003 to the Senate Judiciary Committee, replacing the phrase "treatment facilities" with the generic "penal or correctional facilities." The draft read as follows:

> The Director may contract with the proper authorities of a State, territory, or locality, or, at the request of the tribal leaders, with an Indian tribe, for the official detention, including safekeeping, care, subsistence, correctional programs and employment, in a federal penal or correctional facility, of a person convicted of an offense in a court of such

> State or territory or Indian tribe, if the Director finds that proper and adequate penal or correctional facilities and personnel are available. . . .

S. 1722, 96th Cong., 1st Sess. §573(b)(1980).

The Committee reported the bill favorably, giving no explanation of the change. S. Rep. No. 553, 96th Cong., 2d Sess. 1222-1223.

The House Judiciary Committee was given the same amendatory language and did not approve it. The House Committee made note of the conflicting judicial interpretations of §5003, H. Rep. No. 96-1396, 96th Cong., 2d Sess. 480 (Sept. 25, 1980) and reported a bill which retained §5003's treatment facilities terminology:

> The Attorney General, when the Director certifies that proper and adequate treatment facilities and personnel are available, is authorized to contract with the proper officials of a state for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or territory, but any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

H.R. 6915, 96th Cong. 2d Sess. §3918(a)(1980).

The House and Senate versions were never reconciled and Congress adjourned without voting on them.

The *Lono* court was correct, on the basis of the 1951-1952 legislative history, in deeming the statute's "treatment facilities" language "advisedly used." 581 F.2d at 647. The 1980 Congress was not immediately agreeable

to changing it. Failing to get its amendment through Congress the government now asks the Court to pass on it. If a statute is deemed unwise, the remedy is an act of Congress, not "legislation under the guise of construction." *Dorszynski* v. *United States, supra,* 418 U.S. at 442, quoting *Blockburger* v. *United States,* 284 U.S. 299 (1932). Treatment facilities remains in §5003; Congress did not and courts can not write it out.

B. The Term Treatment Facilities Includes Facilities for Youth, Young Adults, Narcotics Addicts, Alcoholics, and the Mentally and Physically Ill.

Treatment facilities, as a broad euphemism for ordinary prison, was an administrative, not a Congressional usage.

> Correctional managers often speak in terms of diagnosis, of observation, of therapy, and of treatment. The classification teams in institutions are referred to as "treatment" teams, and the activities planned for the offender as he enters prison is called a "treatment" program.

Norman A. Carlson, "The Federal Prison System: Forty-Five Years of Change," 39 Fed. Probation No. 4 p. 37, 39 (June 1975).

Mr. Carlson refers to this as "the myth of the medical model" and condemns it as "inaccurate and misleading." Id.

Congress, by contrast, has used the medical model selectively. Not everyone convicted of a crime against the United States is *ipso facto* ill and in need of treatment. But Congress has found the model and its medical termi-

nology applicable to specific categories of inmates, and has mandated specialized treatment programs to deal with them. These specialized programs are termed "treatment facilities" by statute or in common speech. They cover the following cases: certain offenders under 22 years of age and certain other offenders 22-26 years of age; narcotics addicts; alcoholics; persons suffering from mental illness or mental defects; and inmates suffering physical illnesses or disabilities.

Congress' longstanding practice of defining special groups of offenders along with special therapeutic commitments for them has recently come under criticism in the Senate Judiciary Committee. Proposed amendments to the criminal code would delete the special Narcotics Addict Rehabilitation Act and YCA sentencing procedures and put the decision in the hands of the Bureau. The Senate Judiciary Committee found the current scheme too rigid:

> While 18 U.S.C. §4253 provides for special offender facilities for certain categories of offenders found by a sentencing judge to be narcotic addicts who are "likely to be rehabilitated through treatment", and 18 U.S.C. §5011 provides for special treatment facilities for offenders sentenced as youth offenders, there is no general provision in current law enumerating other possible specialized prison facilities.

S. Rep. 553, 96th Cong., 2d Sess. 1221-2 (1980)

Nevertheless, the following classes of treatment facilities continue to exist:

Youth Corrections Act commitments are to "treat-

ment facilities." We have already noted the explicit legislative reference to the YCA in the legislative history of §5003, and the identity of statutory language between §5003 and §§5012-13. Compare *Oscar Mayer & Co.* v. *Evans,* 441 U.S. 750, 755-756 (1979) (same construction where statutes have common purpose and language). The "specialized treatment needs" language in the committee report on §5003 is echoed in the legislative history of the earlier act: the YCA aims at providing "specialized treatment for youth offenders. . . ." House Rep. 2979, quoted in 1950 U.S. Cong. Service 3983, 3993. The statute was intended to place youth, as distinct from adult offenders, within the "medical model" of corrections. See *Watts* v. *Hadden,* 469 F.Supp. 223, 231 (D. Colo. 1979). It intends a system of "treatment" as distinct from "ordinary prison." See *Dorszynski* v. *United States, supra; Harvin* v. *United States,* 445 F.2d 675 (D.C. Cir.), *cert. denied* 404 U.S. 943 (1971); *Johnson* v. *Bell,* 487 F.Supp. 977, 982-987 (E.D. Mich. S.D. 1980); *Watts* v. *Hadden, supra.* Compare *United States* v. *Ortiz,* 513 F.2d 198, 199 (9th Cir.), *cert. denied* 423 U.S. 843 (1975) holding concurrent YCA and adult sentences to be "inconsistent."[5]

A youth offender is a person under twenty-two years of age when convicted. 18 U.S.C. §5006(d). The same sen-

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[5] In *Duncan* v. *Madigan,* 278 F.2d 695, 696 (9th Cir. 1960), *cert. denied* 366 U.S. 919 (1961), an inmate contended that §5003 was limited to Youth Offenders and was summarily turned down. We agree that §5003 can not be so limited, but YCA-type placements were clearly a major part of what Congress had in mind.

tence to "treatment" is available to offenders twenty-two to twenty-six years old, as "young adult offenders" under 18 U.S.C. §4216. §5003 thus covers all state inmates under twenty-six years old who would benefit from treatment.

A second kind of sentence Congressionally defined as "treatment" is the commitment of a narcotics addict under the Narcotic Addict Rehabilitation Act, 18 U.S.C. §§4251-4255. An eligible offender is committed to the Attorney General "for treatment" for an indeterminate period not to exceed ten years or the maximum punishment for the crime. 18 U.S.C. §4253. The term "treatment" under the act

> includes confinement and treatment in an institution and under supervised aftercare in the community and includes, but is not limited to, medical, educational social, psychological, and vocational services, corrective or preventive guidance and training, and other rehabilitative services designed to protect the public and benefit the addict by eliminating his dependence on addicting drugs, or by controlling his dependence, and his susceptibility to addiction.

18 U.S.C. §4251(c)

Some NARA commitments occur within Bureau prisons. See 42 U.S.C. §225a making appropriations for narcotics programs available to the Bureau. Others are to the Public Health Service for "care and treatment" in a hospital or "other appropriate medical facility." 42 U.S.C. §257(a).

"Treatment facilities" also includes its ordinary medical meanings. 42 U.S.C. §250 provides that the Department of Health and Human Services (formerly the Public Health Service)

> shall supervise and furnish medical treatment and other necessary medical, psychiatric, and related technical and scientific services,

as authorized by 18 U.S.C. §4005. The United States Medical Center for Federal Prisoners at Springfield, Missouri, is a part of the Federal prison system. See *Van Sirrs* v. *Ciccone,* 437 F.2d 884, 885 (8th Cir. 1971). So, of course, are prison infirmaries located within the other institutions. These are treatment facilities in common speech; the statute permits state prisoners in need of medical treatment to be transferred to federal facilities.

Inmates found to be insane in federal prison may "be removed to the United States hospital for defective delinquents or to any other institution authorized by law to receive insane persons . . . convicted of offenses against the United States. . . ." 18 U.S.C. §4241. See *Greenwood* v. *United States,* 350 U.S. 366, 373-374 (1956). The Medical Center at Springfield has intensive psychiatric facilities, see *Federal Prison System Facilities,* U.S. Department of Justice (1980) p. 85, as does the Federal Correctional Institution at Butner, North Carolina. Ibid. 27. Such psychiatric institutions are also "treatment facilities" in common parlance.

Another category of inmates whom Congress has defined as "ill" is alcoholics. In a statement of Congres-

sional purpose in the Comprehensive Alcohol Abuse and Alcohol Prevention, Treatment and Rehabilitation Program, 42 U.S.C. Ch. 60, Congress defined alcoholism as "an illness requiring treatment and rehabilitation." 42 U.S.C. §4541(a)(8). It called for "development of methods for diverting problem drinkers from criminal justice systems into prevention and treatment programs." 42 U.S.C. §4541(b)(2). 42 U.S.C. §4554 set up an Interagency Committee on Federal Activities for Alcohol Abuse and Alcoholism, including appropriate representation from the Department of Justice. 42 U.S.C. §4577(a) authorizes grants to set up alcohol programs "in cooperation with law enforcement personnel . . . penal institutions, and other public agencies." See also 42 U.S.C. §225a authorizing grants to the Bureau for "treatment and research programs and facilities for alcoholism" as well as narcotics problems. While alcoholics do not receive sentences to "treatment" like YCA and NARA offenders, they are victims of a Congressionally defined "illness," and alcohol programs must be deemed "treatment facilities" under §5003.

Finally, the Director is permitted to transfer inmates to a "residential community treatment center." 18 U.S.C. §4082. These are pre-release centers offering intensive counselling services to inmates in the months preceding their release; by 1980 nine had been established. *Federal Prison System Facilities, supra,* pp. 98-99. Such centers are also, at least arguably, "treatment facilities" within the meaning of §5003.

Congress has not adopted the "medical model" of corrections for all prisoners, but it has found it applicable to

these special classes. In each of these cases Congress has singled out special types of inmates and mandated or authorized types of commitment different from that of the ordinary prison population. In each case the defining characteristic is a specialized "treatment" need, in a more or less strictly therapeutic sense.

Most of these needs had been identified when §5003 was passed. The House Report refers to juveniles, drug addicts, and medical programs. The NARA, Alcoholism, and young adult offender programs were enacted subsequently. §5003, read to refer to these other statutes, is both definite and flexible. Congress has stated what are to be considered treatment facilities, and it is free to define new types. And of course §5003 also encompasses all facilities opened up by the Bureau without specific Congressional authorization if they can be called "treatment facilities" in common speech.

C. The Right To A Hearing And The Right To Return When Treatment Is Terminated.

1. *The necessity of a pre-transfer hearing on the availability of appropriate treatment facilities.*

Mr. Howe alleged in his complaint that the federal respondents had "not determined that a special treatment program is contemplated or exists for him." J.A. 4 para. 7 (emphasis added). The allegation was borne out. Transfer proceedings held under the State Department of Corrections culminated in a finding, required by state law, that "all in-state treatment and rehabilitative programs available for the inmate have been considered and

found unsuitable." 28 V.S.A. §706(a). See Vermont Department of Corrections Policy No. 891, J.A. 15, criterion No. 1; Transfer Hearing Memorandum of February 22, 1977, J.A. 25. But there was no finding at the state or federal level that treatment programs were available in the Bureau's facilities which were appropriate to Mr. Howe's treatment needs. The Vermont Commissioner had a general knowledge of what programs were to be found in the federal system, and he was also aware of the contract. J.A. 32-33. As we have noted, the contract certifies only that "facilities" are available at "Federal Institutions"; nothing certifies the availability of treatment facilities. J.A. 10. The Bureau, for its part, programmed Howe into the system by the same criteria used for federal prisoners, i.e. custody and general rehabilitation considerations. Tippy Deposition 9, 23, 25. The Second Circuit believed that the federal government would probably not be able to show that it could provide proper treatment. "Given the nature of his crime and the length of his sentence, it is likely that deterrence rather than hopes of reform provided the basis of his sentence." J.A. 42n.4.

Federal imprisonment is prohibited except when specifically authorized. 18 U.S.C. §4001(a). An inmate in state prison has a right or "justifiable expectation," *Montanye* v. *Haymes*, 427 U.S. 236, 243 (1976), rooted §4001(a) and §5003 that he will not be held in a federal institution unless there is a determination that treatment facilities appropriate to his treatment needs exist. Cf. *Meachum* v. *Fano*, 427 U.S. 215, 228 (1976) holding that

no protectable expectation exists when transfers may be effected "for whatever reason or for no reason at all."[6] A prison inmate slated for a transfer under §5003 to a federal treatment facility, like an inmate chosen for transfer to a mental hospital, *Vitek* v. *Jones,* 445 U.S. 480 (1980) is therefore entitled under the due process clause to fair hearing procedures before the determination is made.

Because the Second Circuit construed §5003 to authorize full discretion to accept any state inmate, it viewed the case as indistinguishable from *Meachum* and *Montanye* v. *Haymes;* finding no protectable liberty interest it implicitly found that no process was due.

The Seventh Circuit in *Anthony* reaches the due process question and decides, after extensive discussion, that safeguards similar to those afforded inmates in *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) (parole revocation) and in *Vitek* v. *Jones,* are also appropriate here. Because the ultimate finding on the transfer question must, by statute, be made by the Director, the hearings must be held, at least in part, before federal officials.

> According to federal counsel, the Director of the Bureau of Prisons or his representative reviewed each transferee's file and on that basis made a find-

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[6] The hardships of transfers thousands of miles from an inmate's family, counsel and friends are surely different in degree if not in kind from the intra-state transfers considered in *Meachum* and *Montanye* v. *Haymes.* The effects upon the inmate and the rehabilitative process are discussed below, at pp. *32-34.*

> ing that the individual state prisoner was in need of maximum security unavailable in the state but readily available in the federal system. The language of §5003, which states that the Attorney General may contract with the states after certification from the Director of the Bureau that treatment facilities are available, makes clear that the ultimate finding of the need for treatment and of its potential satisfaction in the federal system must come from the Director. In the instant case the federal system accepted these prisoners without any federal participation in, or direct corroboration of the *determination of the need for specialized treatment and of how it could be met in the federal system.*

Anthony v. *Wilkinson,* slip op. 25-26 (emphasis added)

We have no more to add to the Anthony court's thoughtful resolution of this issue. Rather than restating the arguments here, the Court is respectfully referred to pp. 20-30 of that opinion. The lack of a hearing to determine whether proper treatment facilities were available denied the petitioner his right to due process.

2. *The duty to return an inmate once treatment has been terminated.*

The Complaint also alleged that "While Plaintiff was confined in the federal system he was not provided a special treatment program, but merely incarcerated." J.A. 4 para. 8. At the trial he testified that he had initially received some psychological counselling but it was terminated in Terre Haute by the psychologist, who told him

that he no longer needed therapy. The District Court found as fact:

> At Terre Haute plaintiff ran a sewing machine until he had a heart attack, about a month before he was returned to Vermont for this litigation. His principal activities now [i.e. in Terre Haute] are knitting and crocheting.

J.A. 33.

See Trial Transcript, pp. 40, 49,

If Mr. Howe was ever properly enrolled in a federal treatment facility, he no longer is; and the Bureau is under a duty to return him to state custody.

It is true that the Director normally has full statutory authority to transfer federal inmates from one institution to another. 18 U.S.C. §4082(b); *Lawrence* v. *Willingham,* 373 F.2d 731 (10th Cir. 1967); *Rodriquez-Sandoval* v. *United States,* 409 F.2d 529, 532 (1st Cir. 1969). He also has full discretion to re-classify inmates within an institution. *Moody* v. *Daggett,* 429 U.S. 78, 88n. 9 (1976); 18 U.S.C. §4081. But federal inmates as a general rule are committed simply to penal and correctional institutions; they are not specifically committed to "treatment" facilities.

The exceptions to this rule of discretion are those special classes of federal offenders who *are* sentenced to treatment, principally YCA defendants, NARA defendants, and mental commitments.

Thus, in *Harvin* v. *United States, supra,* 445 F.2d 675 (D.C. Cir. 1971) the court construed the specific sentenc-

ing provisions of the YCA "to limit the place in which a sentence under it may be served to an institution where the confinement is consistent with the purposes of the Act to afford treatment and rehabilitation." 445 F.2d 681-682. Similarly, in *United States ex rel. Dancy* v. *Arnold,* 572 F.2d 107 (3d Cir. 1978) the court found that the Bureau's power under §4082 to transfer inmates limited by the YCA; the "Attorney General's authority under 18 U.S.C. §4082 to designate the place of confinement of federal prisoners is limited in this case by the terms of the YCA; he has no discretion to confine a youth offender contrary to the terms of his sentence." 572 F.2d at 114. See also *Johnson* v. *Bell, supra,* 487 F.Supp. 977, 982-987; *Watts* v. *Hadden, supra,* 469 F.Supp. 223. Compare *United States ex rel. Sero* v. *Preiser,* 506 F.2d 1115 (2d Cir. 1974) *cert. denied* sub nom. *Preiser* v. *Sero,* 421 U.S. 921 (1975). In that case youth offenders had been committed by the state to terms of special incarceration, which were longer than the maximum sentence an adult could have received for the same offense. It was found that the incarceration was not special at all, but was indistinguishable from normal prison. The Second Circuit affirmed the grant of habeas corpus finding, in the absence of special types of incarceration, no *quid pro quo* for the longer terms. 506 2d 1124. Cf. *Carter* v. *United States, supra.*

NARA defendants are also committed to "treatment" and this imposes some limit on the Bureau's power to transfer and classify them. Thus, in *Hazel* v. *Carlson,* 557 F.2d 50 (2d Cir. 1977) a NARA inmate was transferred from Danbury Correctional Institution to Lewisburg

Penitentiary. He claimed that the Bureau operated only five prisons with drug treatment facilities for NARA defendants; Danbury was one of them but Lewisburg was not. The District Court had held that the transfer was within the Attorney General's discretion, under §4082. The Second Circuit remanded for findings on the quality and type of drug rehabilitation facilities at Lewisburg. 557 F.2d at 51.

The same approach applies to mental commitments. In *O'Connor* v. *Donaldson,* 422 U.S. 563 (1975) the Court held that a patient civilly committed to an institution who was no longer receiving any treatment worthy of the term (he got "milieu therapy") was entitled to be released, notwithstanding that there may have been good and sufficient reasons for the original commitment. And in *Vitek* v. *Jones, supra,* the Court acknowledged that confinement in a mental institution imposes deprivations and hardships above and beyond those of normal imprisonment, 445 U.S. at 493 and cases cited. Reading these two cases together it seems safe to say that an inmate committed to a mental institution for treatment must be released back to prison if he is no longer in need of treatment.[7]

State inmates admitted to federal treatment centers should be treated no differently. Once treatment is at an end, the Director does not have authority to re-transfer them to an institution which is not a treatment facility, or

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[7] Return from a federal hospital to prison after termination of treatment is required by statute. 18 U.S.C. §4241.

to reclassify them into a program which does not provide treatment as that word is used in §5003. An inmate received for an operation in a federal prison hospital can not then be retained in federal prison for the rest of his life sentence.

The Congressional authorization was to admit prisoners to treatment facilities. Once the inmate is no longer enrolled in such facilities, the Bureau lacks power to hold him further. 18 U.S.C. §4001(a). If Mr. Howe was ever properly transferred to federal treatment facilities, he is no longer held there for purposes of treatment. The Attorney General must return him to Vermont.

D. The Agency Interpretation Doctrine Is Inapplicable To This Case

Ordinarily the construction of a statute by those who are charged with its execution should be given weight. *United States* v. *National Association of Securities Dealers,* 422 U.S. 694, 719 (1975). The Second Circuit was guided by this principle in taking the language of §5003 "if not quite at face value, at least with the values and construction put upon it by those in the administrative agencies, both federal and state . . . for whom treatment appears as only one of the several goals which may be served by incarceration and only one of the purposes the statute was intended to serve." J.A. 45. See also *Lono* v. *Fenton, supra,* 581 F.2d at 649 (Bauer, J. dissenting).

If Congress meant to accept state prisoners when commodious penal or correctional facilities were available,

the words were there to say it. As the Court wrote in another case of administrative overreaching,

> The idea which is now sought to be read into the grant by Congress to the Administrator . . . is not so complicated nor is English speech so poor that words were not easily available to express the idea or at least to suggest it. After all, legislation when not expressed in technical terms is addressed to do the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has a right to rely on ordinary words addressed to him.

Addison v. *Holly Hill Co.*, 322 U.S. 607, 618 (1944).

Terming prisons "treatment facilities" is pure Orwellian newspeak, not English. Even within the Bureau of Prisons this jargon has come to be seen as something of an embarrassment. See *Carlson, supra,* "The First Forty Years." Another writer in the Bureau publication Federal Probation has noted,

> It is an extraordinary feature of the history of the institution of punishment that a contingent, incidental concommitant should in this century have been elevated to the status of prime or essential function. B. Frank, "The American Prison: The End of an Era", 43 Fed. Probation No. 3 p. 3, 6 (Sept. 1979), quoting Morris, Norval and Hawkins, George, "Letter to the President on Crime Control," Chicago, Illinois, University of Chicago Press, 1977, p. 63-64.

More to the point, Congress always avoided the jargon and its use of the phrase in §5003 — if legislative history and its choice of language in prior and subsequent enact-

ments are any guides — was not intended to have a "technical" meaning. As Justice Frankfurter wrote in the *Holly Hill* case,

> To let general words draw nourishment from their purpose is one thing. To draw on some unexpressed spirit outside the bounds of the normal meaning of the words is quite another.

322 U.S. at 617.

It is unclear when the Bureau started to give §5003 its broadened construction. Judge Bauer in his dissent in *Lono* refers to it as a "settled" practice, but we have been unable to determine if it was ever written down, or when, or at what level. See *Investment Co. Institute* v. *Camp*, 401 U.S. 617, 627-628 (1971) where the administrator "adopted no expressly articulated" position and arguments of the agency's appellate counsel were not agency interpretations. See also *Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 287 N.5 (1978) (the weight to be given an agency interpretation depends, in part, on the thoroughness with which it was considered and its consistency over time). Compare *United States* v. *National Association of Securities Dealers*, at 718-719 (agency interpretation found in a published opinion letter and formal staff report); *Saxbe* v. *Bustos*, 419 U.S. 65, 73 n. 25 (1974) (agency regulation stated in written general order). The published regulations, by contrast, retain the "treatment facilities" requirement, and indeed stress it. Among the Director's various enumerated duties is

> Entering into contracts with State or Territorial officials for the custody, care, subsistence, education,

> treatment, and training of State or territorial prisoners, upon certification with respect to the availability of proper and adequate treatment facilities and personnel. . . .

28 C.F.R. §0.95(g)

The Bureeau's regulations masked its practice. The issue did not reach the courts until 1978. When the Government brought Congress a proposed amendment ratifying current practice in 1980, Congress failed to act. It is fanciful to suggest that Congress knew about the practice all the time and that its silence denotes consent. See *Beshaw* v. *Fenton,* slip op. 11-12.

Indeed, the practice of boarding large numbers of state inmates in federal prisons appears to be of relatively recent vintage. In 1974 there were only 45 "state boarded" prisoners in federal facilities. Sourcebook of Criminal Justice Statistics — 1976, U.S. Department of Justice (1977) p. 722. In 1975 the figure was 62. Sourcebook of Criminal Justice Statistics — 1977, U.S. Department of Justice (1978) p. 666. In March, 1980, counsel for one of the prisoners in *Anthony* was informed by the Bureau that the figure was 280. *Girouard* v. *Wilkinson,* Nos. 79-2361 and 79-2410, Brief for Petitioner-Appellee, p. 6 n.2.

We are informed by the Solicitor General's office that as of December 31, 1980, there were 836 state and territorial inmates in federal custody. The data furnished to

us by the government indicate that these transfers are for custody and not therapeutic purposes.[8]

E. Treatment Facilities Can Not Mean "Run-Of-The-Mill" Rehabilitative Programming.

The Second Circuit held that treatment facilities need only be nominally rehabilitative; it was immaterial whether the transferred prisoner actually received (or needed) treatment even in the broad sense of "reform." J.A. 44. In *Anthony* v. *Wilkinson* the Seventh Circuit, faced with mounting opposition to *Lono* and indications that the government had been less than diligent in observing it,[9] looked for a compromise position. *Lono*

[8] The Bureau designates six levels of security, level six being the highest and level one the lowest. The breakdown of state inmates by security level is as follows:

Security Level	Number of Inmates
5 & 6	343
4	179
3	104
2	67
1	34

In addition, 109 state or territorial inmates were held at various "Administrative Facilities."

[9] In its order consolidating the various appeals decided in *Anthony* and fixing a briefing schedule the court wrote as follows:

> The *en banc* decision of this court in *Lono* was filed on July 25, 1978. No Petition for Certiorari was sought by the United States. Now well over a year later this court is faced with *Lono* questions being raised by numerous state prisoners in federal custody in this circuit. We assume that the Department of Justice has not chosen to ignore *Lono* in this circuit. We also inquire generally of government counsel what, if anything, is being done in this circuit to comply with *Lono*.

Anthony et al. v. *Wilkinson et al.*, Order of November 29, 1979, pp. 2-3.

would not be overruled. The legislative history compelled the conclusion "that 'treatment' must be construed as therapeutic or rehabilitative in nature." Treatment, the court wrote is different from mere incarceration. Nevertheless, it can be read broadly to "encompass procedures and conditions which primarily benefit the prisoner individually and not simply society as a whole." Slip op. 17. It need only be something which "directly enhances the well-being of the individual prisoner." Ibid, n. 18. The court justified this retreat from *Lono* on humanitarian grounds:

> The increased availability of programs in the federal system is an improvement upon the conditions under which petitioners would remain incarcerated in the state systems. While the availability of programs alone is no guaranty that the prisoner will participate we find that this amelioration of conditions is likely to benefit the prisoner. Accordingly we perceive a therapeutic benefit which *for these purposes* may be construed as "treatment." Thus, if a sufficient array of programs is provided in connection with incarceration in a maximum security prison, it may be possible to conclude in individual cases under *Lono* that a need for specialized treatment has been demonstrated.

Slip op. 17, court's emphasis

Treatment facilities, the *Anthony* court held, are not merely prisons, but prisons in their rehabilitative aspect. The court seems uncomfortable in this conclusion and justifiably so. Prisons in America are rehabilitative institutions and have been for many years. From its

inception the Bureau espoused rehabilitation as one of its cardinal functions. "Rehabilitation of the prisoner as the primary purpose of incarceration became national public policy in 1929 when the U.S. Congress authorized the creation of a Federal Bureau of Prisons." B. Frank, "The American Prison: The End of an Era," *supra,* 43 Fed. Prob. No. 3 at p. 5. Compare *Carlson, supra,* "The First Forty-Five Years," 39 Fed. Prob. No. 4 at p. 40, promising continued commitment to programs "in which an offender can maximize his potential for change." The meaning of the term, as the *Anthony* opinion recognizes, varies over time and has covered everything from hard labor to psychosurgery and "education." Slip op. 17 n. 19. The court's new test — facilities "which primarily benefit the prisoner individually and not simply society as a whole" — is difficult to apply. Courts will be hard-pressed to make such judgments. Nor is there much to guide a court in determining whether "a sufficient array of programs" has been provided. The crucial issue under the statute is not the number of programs or the general benignity of the incarceration but the *type* of program and its propriety for the individual inmate.

The principal motivation behind the court's holding was the states' asserted lack of suitable long-term maximum security facilities, and the "amelioration of conditions" which a transfer can bring about. We argue below that the states' claims are exaggerated. More importantly, however, Congress did not enact §5003 to "ameliorate conditions" generally, or to provide states with assistance in their custody needs. It acted with a view to treatment needs and a narrow reference to treatment facilities.

In construing a statute, courts are obliged to give effect, if possible, to every word Congress used. *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 339 (1979). In the phrase "treatment facilities" the *Anthony* court reads "treatment" to include work programs, educational programs, and recreational programs. Slip op. 16. But included among the items contracted for are "education, treatment, and training." *Anthony's* construction of "treatment" renders "education" and "training" wholly redundant. Even ignoring this redundancy and granting that any rehabilitative program qualifies as treatment in a sense, "treatment facilities" can not denote schools, athletic programs, religious programs, or job training, although all of these things "primarily benefit the prisoner."

Even under the *Anthony* court's test, the petitioner in this case is illegally held. He is no longer a recipient of even "run-of-the-mill" rehabilitative programs, unless knitting and crocheting are to count as rehabilitation. The Second Circuit believed that his transfer was not for rehabilitative purposes. J.A. 42 n.4. The record is clear that the only reason now for his incarceration in Terre Haute is custody. He is no longer held "pursuant to an Act of Congress." 18 U.S.C. §4001(a).

F. Policy Implications

The state complains that it lacks maximum security facilities. In fact, the record shows that it has maximum security facilities in one wing of the St. Albans Facility; it contends that these facilities are cramped and not suited

for long-term prisoners. J.A. 40-41. It presents its case almost as a matter of necessity.

Even without upgrading the security of St. Albans Vermont was able to incarcerate Mr. Howe tolerably well. The District Court found that in St. Albans he did not enjoy the same freedom of movement which he had at Terre Haute and Atlanta. Nevertheless,

> The programs at St. Albans . . . were substantially similar to those at the federal institutions although somewhat less accessible to Howe because of restrictions on his ability to move about the St. Albans Facility. The only two programs in which he actually participated at St. Albans were psychiatric counselling and educational courses but others probably were available to him if he wished.

J.A. 33.

Vermont is a member of the New England Corrections Compact, 28 V.S.A. §§1401-1410. The Compact authorizes the party states to contract with each other "for the confinement of inmates on behalf of a sending state in institutions situated within the receiving states." 28 V.S.A. §1403.[10] Vermont is also a member of the Interstate Corrections Compact, 28 V.S.A. §§1601-1610, which contains an identical grant of authority to contract for the confinement of inmates. 28 V.S.A. §1603(a). If

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[10] Transfers to these neighboring states are of course less onerous than many §5003 transfer in terms of distance from the inmate's home. Indeed Mr. Howe asked at his transfer hearing to be sent to New Hampshire if he was found unsuitable for St. Albans. J.A. 25.

confinement is what the state needs it has these options; there is no need to send inmates to the Bureau of Prisons under the guise of treatment.

Ultimately, of course, the state has the option of upgrading existing facilities or building a new one. Vermont had a maximum security prison, at Windsor, Vermont, and closed it down in 1975 as a result of its agreement with the Bureau of Prisons to transfer up to forty Vermont prisoners to the Bureau without prior approval. J.A. 10, 34, *Rebideau* v. *Stoneman,* 398 F.Supp. 805 (D. Vt. 1975), aff'd 575 F.2d 31 (2d Cir. 1978) (per curiam). An unauthorized arrangement of mutual convenience does not become authorized because it has proved convenient. A statute can not be amended by an administrative *fait accompli.*

In 1916 a United States District Judge wrote as follows:

> While prisoners have no right to receive visits from their family, they are at present universally allowed to do so at certain intervals, both for their own good and for the sake of their family. The transfer of a prisoner, having a wife and young child, from a prison near which they reside, and at which they can visit him, to a distant place of confinement where they may well be unable to go, with the result that they may not see him for 10 or 12 years, obviously imposes on him an additional hardship . . . and additional peril. It may result in the loss of that interest in him by his family and friends which would be maintained if they saw him occasionally, and which furnishes one of his most powerful incentives to reformation and honest living after his discharge.

Keliher v. *Mitchell,* 250 F. 904, 906-907 (D. Mass. 1916) (Morton, J.) (citations omitted).

The Court in *Meachum* v. *Fano* seems to acknowledge that transfers could impose "grievous" loss, holding only that an inmate is not protected against such loss by the due process clause, absent some expectation rooted in law that he will not be transferred. 427 U.S. at 224. See also *Montanye* v. *Haymes, supra,* 427 U.S. at 241 N.4., quoting the Second Circuit's recitation of the hardships involved.

Transfers from one jurisdiction to another carry special hardships.

> Transfer to a foreign jurisdiction has traditionally been regarded as altogether different [from transfers within a jurisdiction]: to be cast outside the jurisdiction within which one was sentenced is often to be separated from rights and privileges and standards otherwise available — to become, to some degree, a "man without a country."

Gomes v. *Travisono,* 490 F.2d 1209, 1217 (1st Cir. 1973) (Campbell, J. concurring), vacated and remanded. sub nom. *Travisono* v. *Gomes,* 418 U.S. 909 (1974)

In *Tai* v. *Thompson,* 387 F.Supp. 912, 915-916 (D. Hawaii 1975) the court wrote that a §5003 transfer from Hawaii to Atlanta

> is a different matter from a mere transfer across state lines. The isolation of the prisoner — his inability to receive the help of his counsel, friends, family in Hawaii — amounts to a loss of liberty similar to placing him in solitary confinement.

In a footnote the court remarked that this kind of isolation lasts a lot longer. Id. n. 20. And in *Capitan* v. *Cupp,*

356 F.Supp. 302, 303 (D. Ore. 1972), a §5003 transfer from Oregon State Penitentiary to Leavenworth, the court wrote:

> I am satisfied that the transfer of a prisoner from a state institution to a federal prison 2,000 miles from his family and his home is a "grievous loss" which requires the imposition of some procedural safeguards.

See also *Hoitt* v. *Vitek*, 361 F.Supp. 1238 (D.N.H. 1973), aff'd. 495 F.2d 219, 497 F.2d 598 (1974), noting a number of adverse effects of long distance transfers; *Croom* v. *Manson*, 367 F.Supp. 586, 590 (D. Conn. 1973), stressing the lack of family and counsel visits.

The harm is not only to the inmate but to society as a whole. A psychiatrist in *Hoitt* v. *Vitek* testified that these transfers have a detrimental effect on the inmate's rehabilitation; "transfer can never be beneficial to the transferred inmate, even if the conditions of confinement at the receiving institution are better than those existing at the institution from which he was sent." Transfer of an inmate away from his community "is destructive of the positive reinforcement an inmate receives from family and friends. . . ." 361 F.Supp. at 1249-1250. This is not simply one doctor's opinion. We are advised that the Bureau attempts to place federal inmates in institutions near their home communities. The new Community Treatment Centers are also a step in this direction. The need to integrate the inmate with the community is the basic message of the 1967 Task Force Report on Correction:

> The task of corrections therefore includes rebuilding solid ties between offender and community, inte-

> grating or reintegrating the offender into community life — restoring family ties, obtaining employment and education, securing in the larger sense a place for the offender in the routine functioning of society.
>
> President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections (1967) p. 8.

Implications of this view are community-based programs and liberal visiting.[11] Id. pp. 9-10, 56-57.

Considerations such as these could well have motivated Congress to limit the states' ability to transfer prisoners to cases of specialized treatment needs, even if the Bureau's prisons were better than what the states provided and even though the arrangement might be cost-efficient for the Bureau and the states.

The mushrooming population of state and territorial prisoners in federal prisons raises another serious policy consideration. Judge Wood, the author of the *Lono* opinion, wrote a brief concurring opinion on this point in *Anthony:*

> If a national prison system instead of a federal prison system is to be enacted, it should be accomplished by the Congress and not the court. I do not believe it

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[11] Chief Justice Burger in his recent speech to the American Bar Association also called for policies permitting "[g]enerous family visitation in decent surroundings to maintain family ties. . . ." Annual Report to the American Bar Association (Houston, Texas, February 8, 1981) p. 10.

> is up to judges to provide the states with an unlegislated method merely to permit them to avoid one of their most troublesome local responsibilities. States should be expected to take care of their own except within the limitations of the present statute until such time as Congress makes it clear that the Bureau of Prisons is authorized generally to go into the rent-a-prison business.

Slip op. 33

Judge Wood considered the business would be successful, given the Bureau's desservedly high reputation. If that is what Congress now intends, it will say so in plain language.

CONCLUSION

For the above-stated reasons the judgment of the Court of Appeals for the Second Circuit should be reversed.

Respectfully submitted,

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